A

JARDINE LLOYD THOMPSON SDN BHD

v.

BERJAYA SOMPO INSURANCE BERHAD

B

COURT OF APPEAL, PUTRAJAYA
ZAHARAH IBRAHIM JCA
ANANTHAM KASINATHER JCA
VARGHESE GEORGE JCA
[CIVIL APPEAL NO: W-02(NCC)(W)-2036-09-2013]

C

25 MARCH 2014

INSURANCE: *Insurance clause - Construction of - Claim for indemnity under policy against insurer - Misappropriation of money by fraudulent means by employee of insured - Whether 'loss of monies' fell within*

D *optional extension clause of policy - Whether loss must concern one of specified items listed in proviso - Whether insured entitled to be indemnified*

The appellant ('insured') provided general insurance and brokering

E services, whilst the respondent ('insurer') was in the business of underwriting general insurance risk for brokers and other professionals. Under the terms of the policy of insurance, the insurer agreed to indemnify the insured against claims brought against the insured of which notice to the insurer had been given

F during the validity of the policy. Subsequently, when the insured notified the insurer of a potential claim under the policy, the insurer repudiated any liability and cited several reasons for the position taken by them. It was not disputed that an employee of the insured, Razak, had committed certain fraudulent act against a

G client of the insured, Affin Bank Bhd ('bank') and induced the bank to pay inflated premiums to the insured purportedly to fund certain 'risk management programmes', which turned out to be fictitious and had never taken place. Consequent to the deception by Razak, the insured had to repay the bank the overpaid

H premium. The insured subsequently commenced the action against the insurer to recover the said sum by way of indemnity under the terms and conditions of the policy. The questions raised for consideration in the High Court were: (i) whether the loss of monies claimed by the insured as a result of the risk management

I programmes fell within optional extension clause of the policy; and (ii) whether the payments to the individual event management

companies fell within the optional extension clause of the policy. The insurer restricted their denial of liability purely to the outcome of the questions which revolved basically on the construction to be accorded on relevant terms of the policy. The High Court Judge, in answering both questions in the negative, relied to a large extent on the reasoning in the case of *Rouleston Clarke Pty Ltd (In Liquidation) v. FAI General Insurance Company Ltd (Rouleston)*. The judge held that there was no basis in inserting or reading the word 'physical' into the proviso or limitation to meet the facts of the case, as suggested by the insured, as the court had no function to add, amend or vary the terms that was expressly set out and which bound the parties. It was also held that there was no justifiable reason for 'physical loss' to be deemed as an implied term of the contractual relationship, based, either on the legally recognised 'commercial necessity' test or of the 'official bystander' test. The insured's claim was dismissed by the High Court and hence, the present appeal.

Held (allowing appeal)
Per Anantham Kasinather JCA delivering the judgment of the court:

(1) The trial judge had misunderstood the *ratio* in the case of *Rouleston* by unduly concentrating on the words 'loss of money' and whether the words should be accorded the limited meaning of physical loss of money or the wider meaning of financial loss. The proviso only applies where the detriment or disadvantage suffered by the insured arises from being 'deprived of the benefit of any of the specified items regardless of whether they have been physically destroyed or missing'. The *ratio* in the judgment provided that a pre-requisite to the applicability of the proviso is that the loss (physical or otherwise) must concern one of the specified items listed in the proviso. (para 31)

(2) The proviso only operated to preclude the insured from being indemnified by the insurer in cases where, at the point of loss/misappropriation of any of the specified items listed in the proviso by an employee of the insured, the items either belonged to the insured or were in the custody of the insured. In cases where an employee of the insured misappropriates or loses one of the specified items listed in the proviso, then, the loss is that of the insured and not the client of the insured.

In a fact situation of this nature, the insured cannot demand to be indemnified by the insurer because the optional extension clause only exists to indemnify the insured where its client has been defrauded by the fraudulent conduct of the employee when performing his duties on behalf of the insured and not to cases where the insured has been defrauded by his own employee. In other words, the emphasis should be on the nature of the claim of the client of the insured. This must necessarily be so because the optional extension clause only operates in respect of claims where the insurers are not liable in the first place under exclusion cl. 1(b). (para 32)

(3) The foremost consideration when answering the two questions ought to have been, who was the victim of the dishonest conduct of Razak and whether the claim of the client of the insured fell within cl. 1(b) of the policy so as to invite the operation of the optional extension clause. The answer to both questions should have been in the positive upon a consideration of the aforesaid two factors. First, the *modus operandi* of Razak was to misrepresent the client's obligations as regards monies due from the client to the insured. Following the misrepresentation, Razak misappropriated monies paid by the client of the insured but clearly not due to the insured. Secondly, to the extent the monies paid by the client bank to the insured were not lawfully due to the insured, the monies could not be said to belong to the insured. In other words, the victim of the fraud perpetrated by Razak was not the insured but its client, the bank. Thirdly, it was evident that any claim for the recovery or the excess premiums by the client against the insured would have been based on the dishonest conduct of Razak and to that extent the claim would clearly fall within cl. 1(b) and consequently avoid liability on the part of the respondent insurers but for the optional extension clause. (para 33)

(4) The construction placed by the High Court on the optional extension clause would effectively deprive the extension option of any relevance to the insured because the reasoning of the High Court effectively meant that all forms of financial loss would fall outside the ambit of the optional extension, thereby depriving the insured of the peril that it had insured against. The flaw in this reasoning was that in all cases of dishonest conduct there was bound to be a financial loss. The only

manner to reconcile the optional extension clause with exclusion cl. 1(b) of the insurance policy is to focus on the nature of the claim of the victim against the insured bearing in mind that exclusion cl. 1(b) makes it clear that, without the optional extension clause the insured would not be indemnified in respect of claims directly arising out of the fraudulent acts of employees such as Razak. (para 34)

(5) It was stated in *Rouleston* that one instance where the claim of the insured would fall within the ambit of the optional extension clause would be where 'an employee deliberately and maliciously caused a client to pay excessive tax'. Similarly, in the case herein, the insured was in the business of insurance broking and placed and arranged insurance for its clients. Razak caused the client of the appellant to overpay the actual insurance premiums, which he then fraudulently appropriated to his own benefit. The bank demanded and obtained the excess premiums from the insured and based on *Rouleston*, the insured was entitled to be indemnified. (para 35)

Bahasa Malaysia *Translation Of Headnotes*

Perayu (pengambil insurans) menjalankan perkhidmatan insurans am dan pembrokeran, sementara responden ('syarikat insurans') menjalankan perniagaan penaja jaminan risiko insurans am bagi pembroker-pembroker dan profesional-profesional lain. Di bawah terma-terma dan polisi insurans tersebut, syarikat insurans bersetuju untuk menanggung pengambil insurans terhadap tuntutan-tuntutan yang dibawa terhadap pengambil insurans di mana notis kepada syarikat insurans diberikan semasa tempoh polisi masih sah. Kemudian, apabila pengambil insurans memaklumkan kepada syarikat insurans mengenai tuntutan berpotensi di bawah polisi tersebut, syarikat insurans membatalkan apa-apa tanggungan dan memberikan beberapa alasan untuk keputusan mereka. Tidak dipertikaikan bahawa seorang pekerja pengambil insurans, Razak, telah melakukan tindakan frod tertentu terhadap salah satu pelanggan pengambil insurans, Affin Bank Bhd ('bank') dan mendorong bank untuk membayar premium yang dinaikkan kepada pengambil insurans kononnya untuk membiayai 'program pengurusan risiko' tertentu, yang sebenarnya adalah rekaan dan tidak pernah dilaksanakan. Berikutan penipuan oleh Razak, pengambil insurans terpaksa membayar kepada bank jumlah premium yang terlebih bayar. Pengambil insurans kemudiannya

memulakan tindakan terhadap syarikat insurans untuk mendapatkan semula jumlah tersebut melalui indemniti di bawah terma-terma dan syarat-syarat polisi tersebut. Persoalan-persoalan yang dibangkitkan untuk pertimbangan di Mahkamah Tinggi adalah: (i) sama ada kerugian kewangan yang dituntut oleh pengambil insurans disebabkan oleh program pengurusan risiko terangkum dalam klausa lanjutan pilihan polisi tersebut; dan (ii) sama ada bayaran-bayaran kepada syarikat-syarikat pengurusan acara individu terangkum dalam klausa lanjutan pilihan polisi tersebut. Syarikat insurans mengehadkan penafian liabiliti mereka kepada keputusan persoalan-persoalan yang pada asasnya berkisar kepada pentafsiran yang perlu diberikan kepada terma-terma relevan polisi tersebut. Hakim Mahkamah Tinggi, dalam menjawab kedua-dua persoalan secara negatif, bersandar secara besarnya kepada alasan dalam kes *Rouleston Clarke Pty Ltd (In Liquidation) v. FAI General Insurance Company Ltd* (kes *Rouleston*). Hakim memutuskan bahawa tiada asas dalam memasukkan atau membaca perkataan 'physical' ke dalam proviso atau pengehadan untuk melengkapkan fakta kes, seperti yang dicadangkan oleh pengambil insurans, kerana mahkamah tidak mempunyai fungsi untuk menambah, meminda atau mengubah terma-terma yang diberikan secara jelas dan yang mengikat pihak-pihak. Diputuskan juga bahawa tidak ada alasan yang boleh dijustifikasi untuk menganggap 'physical loss' sebagai terma tersirat dalam hubungan kontrak tersebut, berdasarkan, sama ada atas ujian 'keperluan komersial' yang diiktiraf undang-undang atau ujian 'peminggir rasmi'. Tuntutan pengambil insurans ditolak oleh Mahkamah Tinggi dan dengan itu, rayuan ini.

Diputuskan (membenarkan rayuan)

Oleh Anantham Kasinather HMR menyampaikan penghakiman mahkamah:

(1) Hakim bicara telah tersalah faham *ratio* dalam kes *Rouleston* dengan memberikan tumpuan yang lebih kepada perkataan-perkataan 'loss of money' dan sama ada perkataan-perkataan tersebut boleh diberikan maksud terhad bagi kehilangan wang secara fizikal atau maksud yang lebih luas iaitu kehilangan kewangan. Proviso tersebut hanya terpakai di mana kemudaratan atau kerugian dialami oleh pengambil insurans berikutan 'dinafikan faedah apa-apa item yang dikhususkan tanpa mengira sama ada ia telah dimusnahkan secara fizikal

atau hilang'. *Ratio* dalam penghakiman tersebut memperuntukkan bahawa prasyarat kepada pemakaian proviso adalah bahawa kerugian (fizikal atau sebaliknya) adalah berkaitan item yang dinyatakan secara khusus dalam proviso.

(2) Proviso tersebut hanya beroperasi untuk menghalang pengambil insurans daripada dibayar ganti rugi oleh syarikat insurans di mana, pada masa kehilangan/pelesapan apa-apa item yang dinyatakan dalam proviso oleh pekerja pengambil insurans, item tersebut adalah kepunyaan pengambil insurans atau dalam milikan pengambil insurans. Dalam kes-kes di mana pekerja pengambil insurans melesapkan atau kehilangan salah satu item yang dinyatakan dalam proviso, maka, kerugian adalah bagi pengambil insurans dan bukan pelanggan pengambil insurans. Dalam situasi fakta yang sebegini, pengambil insurans tidak boleh menuntut untuk dibayar ganti rugi oleh syarikat insurans kerana klausa lanjutan pilihan hanya wujud untuk membayar ganti rugi pengambil insurans di mana pelanggannya telah ditipu oleh tindakan frod pekerja tersebut semasa melaksanakan tugasnya bagi pihak pengambil insurans dan bukan kepada kes-kes di mana pengambil insurans telah ditipu oleh pekerja sendiri. Ini adalah demikian kerana klausa lanjutan pilihan hanya beroperasi berkaitan dengan tuntutan-tuntutan di mana syarikat insurans sememangnya tidak bertanggungan di bawah klausa pengecualian 1(b).

(3) Pertimbangan utama apabila menjawab kedua-dua persoalan tersebut sepatutnya adalah, siapakah mangsa tindakan tidak jujur Razak dan sama ada tuntutan pelanggan pengambil insurans terangkum dalam klausa 1(b) polisi dan mencetuskan penguatkuasaan klausa lanjutan pilihan. Jawapan bagi kedua-dua persoalan tersebut adalah sepatutnya dijawab dalam positif setelah mempertimbangkan kedua-dua faktor tersebut. Pertama, *modus operandi* Razak adalah untuk memberi gambaran yang salah mengenai tanggungjawab pelanggan berkenaan dengan wang yang perlu dibayar oleh pelanggan kepada pengambil insurans. Berikutan dengan salah representasi tersebut, Razak melesapkan wang yang dibayar oleh pelanggan kepada pengambil insurans tetapi jelas tidak perlu dibayar kepada pengambil insurans. Kedua, setakat wang yang dibayar oleh bank pelanggan kepada pengambil insurans tidak tertunggak secara sah kepada pengambil insurans, wang tersebut tidak boleh dikatakan kepunyaan pengambil insurans. Dalam

perkataan lain, mangsa frod yang dilakukan oleh Razak adalah bukan pengambil insurans tetapi pelanggannya, iaitu bank. Ketiga, adalah jelas bahawa apa-apa tuntutan bagi mendapatkan semula atau lebihan premium oleh pelanggan terhadap pengambil insurans akan berdasarkan kepada tindakan tidak jujur Razak dan setakat itu, tuntutan tersebut jelas terangkum dalam klausa 1(b) dan dengan itu menafikan liabiliti pada pihak syarikat insurans jika bukan kerana klausa lanjutan pilihan.

(4) Pentafsiran yang diberikan oleh Mahkamah Tinggi kepada klausa lanjutan pilihan akan secara efektifnya menafikan hubungan pilihan lanjutan kepada pengambil insurans kerana alasan oleh Mahkamah Tinggi secara efektifnya bermaksud bahawa kesemua bentuk kerugian kewangan akan terangkum di luar lingkungan lanjutan pilihan, dengan itu menafikan pengambil insurans daripada risiko yang diinsuranskannya. Kecacatan dalam alasan ini adalah bahawa, dalam kesemua kes yang melibatkan tindakan penipuan, akan ada kerugian kewangan. Satu-satunya cara untuk menyelaraskan klausa lanjutan pilihan adalah dengan klausa pengecualian 1(b) polisi insurans adalah untuk memfokuskan sifat tuntutan tersebut oleh mangsa terhadap pengambil insurans dengan mempertimbangkan bahawa klausa pengecualian klausa 1(b) menjadikannya jelas bahawa, tanpa klausa lanjutan pilihan pengambil insurans tidak akan dibayar ganti rugi berkaitan dengan tuntutan-tuntutan langsung akibat daripada tindakan penipuan pekerja-pekerja seperti Razak.

(5) Adalah dinyatakan dalam kes *Rouleston* bahawa satu keadaan di mana tuntutan pengambil insurans akan terangkum dalam lingkungan klausa lanjutan pilihan adalah di mana 'seorang pekerja dengan sengaja dan dengan niat jahat menyebabkan pelanggan membayar cukai yang berlebihan'. Sama seperti itu, dalam kes ini, pengambil insurans menjalankan perniagaan pembrokeran insurans dan mengambil dan menguruskan insurans bagi pelanggannya. Razak telah menyebabkan pelanggan pengambil insurans terlebih bayar premium insurans sebenar, yang dia kemudiannya telah ambil secara frod bagi kepentingannya sendiri. Bank menuntut dan memperolehi premium terlebih bayar daripada pengambil insurans dan berdasarkan kes *Rouleston*, pengambil insurans berhak dibayar ganti rugi.

Case(s) referred to:

Malaysia British Assurance Berhad v. Syarikat Pembenaan Karun Sdn Bhd [2008] 1 LNS 491 FC ***(refd)***

Perembun Consortium & Anor v. AXA Affin General Insurance Berhad [2011] 10 CLJ 590 HC ***(refd)***

Rouleston Clarke Pty Ltd (In Liquidation) v. FAI General Insurance Company Limited [2000] TASSC 63 ***(foll)***

For the appellant - Lim Kian Leong; (Paul Ngooi & Kenneth Liew with him); M/s Lim Kian Leong & Co

For the respondent - K Korinavathi; M/s Satha & Co

[Editor's note: For the High Court judgment, please see Jardine Lloyd Thompson Sdn Bhd v. Berjaya Sompo Insurance Bhd [2014] 1 CLJ 635.]

Reported by S Barathi

JUDGMENT

Anantham Kasinather JCA:

Introduction

[1] This was an appeal against the decision of the High Court which had dismissed the appellant-plaintiff's claim brought against the respondent-defendant under the terms of a policy of insurance, to wit, a Professional Indemnity Policy for Insurance Brokers No: 12DHQ/LNDZ78662 issued on 4 December 2012 (the policy).

[2] To best capture the context of the dispute between the parties, the appellant-plaintiff will be referred to in this judgment as the insured whilst the respondent-defendant as the insurer.

Brief Facts

[3] The insured provided general insurance and brokering services. The insurer on the other hand was in the business of underwriting general insurance risk for brokers and other professionals.

[4] Under the terms of the policy, the insurer agreed to indemnify the insured against claims brought against the insured of which notice to the insurer had been given during the validity of the policy, namely from 1 January 2012 to 31 December 2012.

[5] The insured notified the insurer on 9 March 2012 of a potential claim under the policy. The insurer however repudiated any liability and cited several reasons for the position taken by them.

[6] The insured's claim under the policy could be traced to certain fraudulent acts committed by an employee of the insured, one Abdul Razak bin Abdul Ghani ('Razak') principally as against a client of the insured. The essential aspects of the fraud in summary was as follows:

(a) Razak induced the insured's client Affin Bank Berhad ('the bank') by use of forged and falsified documents to pay inflated premiums to the insured (for policies of insurance taken out by the bank) purportedly to fund certain 'risk management programmes', allegedly to be organised by the insured;

(b) Razak then diverted these additional premium payments into third party accounts to which Razak had access. This was perpetrated on the insured by inducing the insured to issue cheques based on forged letters. The payments made by the insured were to event management companies supposedly for the holding of the 'risk management programmes';

(c) The fact was that the 'risk management programmes' were entirely fictitious and none did take place;

(d) Upon discovery of the said deception, the bank demanded from the insured a repayment of the overpaid premium sum. The insured subsequently paid the bank the sum of RM1,096,372.01 as refund of all the additional premium paid to and received by the insured; and

(e) As the insurer has repudiated liability, the insured then commenced this action to recover from the insurer the said sum by way of indemnity under the terms and conditions of the policy.

[7] At the High Court, the parties agreed (on the urgings of the learned trial judge) to an O. 14A process (O. 14A Rules of Court, 2012) to resolve the dispute as between them, since the essential facts were not substantially in dispute.

[8] Although initially four questions of law were drawn up for the determination of the court, the parties finally only retained two of the said issues. They were:

Question 1: Whether the loss of monies claimed by the plaintiff (insured) as a result of the risk management programs does or does not fall within optional extension clauses of the policy.

Question 2: Whether the payments to the individual event management companies falls within the optional extension clause of the policy.

[9] It was not in dispute that the bank was the victim of the fraud committed by Razak, an employee of the insured as there was no 'risk management programme' ever planned or organised by or for the insured. Both the bank and the insured had been deceived by Razak. The insured had to consequently repay the bank the overpaid premium.

The insurer agreed to abandon all other defences that they had raised as grounds for the refusal to indemnify the insured under the policy. They restricted their denial of liability purely to the outcome of the two questions which revolved basically on the construction to be accorded to relevant terms of the policy, and more specifically, the optional extension, option 1-amendment of dishonesty extension clause. (option 1-extension).

The Policy/Optional Extension Clauses

(Option 1 - Amendment of Dishonesty Exclusion)

[10] The material portions of the policy, for consideration, were:

> POLICY SCHEDULE
> INSURANCE BROKER PROFESSIONAL INDEMNITY
> Policy No : 12DHQ/LNDZ78662
> ...
> ...
> ...
> OPTIONAL EXTENSION
> (1) DISHONESTY OF EMPLOYEE
> ...
> ...

PROFESSIONAL INDEMNITY POLICY
FOR INSURANCE BROKERS
INSURING CLAUSES

...

...

...

The Company agrees, subject to the following limitations, terms and conditions and subject to any policy endorsements:

1. To indemnify the Insured against any Claim which may be made against the Insured and notified to the Company during the period of insurance stated in the Schedule:

   (a) For actual or alleged breach of professional duty in the profession of Authorized Insurance Broker; or

   (b) ...

EXCLUSIONS

1. This policy shall not indemnify the Insured in respect of any Claim or Claims made against them:

   (a) ...

   (b) brought about or contributed to by the dishonest, fraudulent, criminal, malicious or deliberate act, error or omission of the Insured (and/or any company or entity which has a beneficial interest in the Insured) of their predecessors in business; or

   (c) ...

   (d) for loss of money, negotiable instruments (including shares), bearer bonds or coupons, stamps, bank or currency notes in the care or custody of the Insured; or

   (e) ...

   (f) ...

   (g) ...

   (h) ...

OPTIONAL EXTENSION CLAUSES

Option 1 - Amendment of Dishonesty Exclusion

If a limit for this Extension is specified in the Schedule, Exclusion 1(b) shall not apply in respect of Claims for damages for breach of professional duty arising out of or contributed to by the dishonest, fraudulent, malicious, or deliberate conduct of the Insured's employees (but not including any partner, director or controlling officer). However, no indemnity will be provided to any person committing or condoning such dishonest, fraudulent, malicious, or deliberate act(s).

This extension does not cover claims arising out or in connection with for loss of money, negotiable instruments, bear bonds or coupons, stamps, bank or currency notes.

Option 2 - Automatic Reinstatement

....

High Court

[11] At the High Court, the insured contended that they were entitled to be indemnified under option 1-extension since the essential ingredients thereto required, namely, that the claim arose in the context of their professional duty to the bank and that the loss was directly caused by a dishonest or fraudulent act of an employee (Razak), had been satisfied.

As regards to the proviso or limitation of the extended cover under option 1-extension, worded in the following terms:

> This extension does not cover claims arising out or in connection with for loss of money, negotiable instrument, bear [sic] bonds or coupons, stamps, bank or currency notes.

It was submitted that the construction of the words 'loss of money' therein stated should be restricted to loss of physical cash or its equivalent (similar to bearer bonds, shares, etc.).

[12] It was further argued for the insured that the extension had been purchased to expressly overcome the effect of exclusion 1(b) of the policy (as confirmed by the reference - extension 1(b) shall not apply ... in the body of option 1-extension) and if the meaning to be given to the words 'loss of money' was more extensive or

wider than 'physical cash', it would lead to an absurd or illogical result, namely excluding recovery of all losses of whatsoever financial nature or consequence. The proviso or the exclusion of 'loss of money' must of necessity therefore mean only loss of physical cash (akin to insurance taken to cover loss of cash in transit, breach of fidelity of employee etc).

[13] Further, relying on the decisions in *Perembun Consortium & Anor v. AXA Affin General Insurance Berhad* [2011] 10 CLJ 590; [2011] 6 MLJ 710 and *Malaysia British Assurance Berhad v Syarikat Pembenaan Karun Sdn Bhd* [2008] 1 LNS 491; [2008] 6 MLJ 29 FC, it was contended for the insured that even if a clause in the insurance policy was open to two or more possible interpretation, the court should in such instance prefer a ruling against the insurer and in favour of the insured based on the '*contra proferentum*' rule of construction.

[14] It was the insurer's contention on the other hand that the words of the proviso or limitation to option 1-extension was free of any ambiguity and therefore ought to be given its clear and literal meaning and effect. It was argued for the insurer that in substance the insured's claim was for loss of monies (that is, loss in terms of financial value) and by force of the proviso or limitation to the extension, the insured who was claiming for financial loss, was not entitled to be paid at all under the policy.

[15] A further point canvassed by the insurer was that the loss sought by the insured to be indemnified under the policy was in substance a repayment of overcharged premium and this did not in any case fall within the terms of the policy.

[16] The insurer's counsel also referred to the decision of the Supreme Court of Tasmania in *Rouleston Clarke Pty Ltd (In Liquidation) v. FAI General Insurance Company Limited* [2000] TASSC 63 where the court (endorsing the court of first instance) had the opportunity to consider a proviso or limitation to the extension clause, almost in identical words to that utilised in the policy in this instant case. The court there had held that the term 'loss of money' included within its purview any detriment or disadvantage suffered as a consequence of being deprived of the benefit of any of the items specified in the provision in question, regardless of whether they had been physically destroyed or mislaid; in other words it was not hinged to physical loss of money only.

Learned Trial Judge

[17] The learned trial judge having considered the respective contentions of the parties answered both the questions posed to the court, in the negative and accordingly proceeded to dismiss the insured's claim.

[18] The learned trial judge in arriving at the aforesaid decision was persuaded to a large extent by the reasoning of the Tasmanian Supreme Court on the almost similarly worded proviso or limitation found in the *Rouleston Clarke* case. The judgment there in that case had also more importantly ruled that there was no ambiguity in the words used; 'loss' as found therein ought to be accorded its natural and ordinary meaning in the specific context of the intended cover under an insurance policy.

[19] The learned trial judge in Her Ladyship's judgment posed the real issue that was before the court in the following manner:

> The relevant words for the purposes of the instant case are 'loss of money'. Should the phrase be accorded a restricted definition, namely the loss of physical money only, or should it be accorded a broader construction so as to encompass financial loss etc.

[20] The learned trial judge was of the view that construing the phrase in the manner suggested by the insured would require the court to insert or read into the proviso or limitation, the word physical, thereby effectively amending it to read - "This extension does not cover claims for physical loss of money". In Her Ladyship's view there was no basis to give it such a strained construction to meet the facts of this case; the court had no function to add, amend or vary the terms that was expressly set out and which bound the parties.

[21] Her Ladyship further noted:

> (iv) If the parties had intended to cover only physical loss of monies or financial instruments, then this should have been and would have been clearly stipulated. There is a considerable difference between 'loss' and 'physical loss'. The latter envisages that the money or financial instrument is lost or misplaced or disappears. However 'loss' encompasses a wide variety of events including a shortfall or deficiency or debit or deficit of money *albeit* from theft of monies or loss of a financial benefit by reason of the loss of

> a financial instrument, rather than the physical loss of the instrument itself. Loss also routinely encompasses damage and injury in a variety of insurance policies. Given the wide discrepancy between the definitions, it would have been incumbent upon parties to specify that loss was restricted to a physical loss; ...

[22] It was also held that there was no justifiable reason for 'physical loss' to be deemed as an implied term of the contractual relationship, based, either on the legally recognised 'commercial necessity' test or of the 'official bystander' test. The learned trial judge went on to further state:

> This is particularly, given that the word 'loss' is routinely utilised in insurance policies to encompass a wide variety of matters from financial deficit to injury and harm. It is regularly utilised to designate financial loss or damage.

[23] Finally at para. 61 of the judgment of the High Court, the learned trial judge held as follows:

> Ultimately **whether the loss is considered as having arisen at the point when the Bank made the payments to the Plaintiff** or **the monies were diverted from the Plaintiff into third party accounts** by the dishonest machinations of Razak, the loss is a financial loss. The financial loss was suffered by the Bank and was reimbursed by the Plaintiff. This claim is therefore a claim arising from financial loss suffered by a client in respect of which it sought reimbursement from the Plaintiff as the financial loss arose by reason of the dishonest acts of the Plaintiff's employee. However **it cannot be disputed that at all times the basis of the claim was a loss of moneys brought about by the dishonest conduct of Razak**. (emphasis added)

Before Us

[24] Firstly, the case for the insurer. Counsel argued that the proviso or limitation to the option 1-extension was clear and no issue arose as to any ambiguity or uncertainty in the meaning of the word 'loss of money' as found there. The option 1-extension was specifically to negate the effect of exclusion cl. 1(b) and as an experienced insurance broker, the insured ought to have been aware of the wide reach of the limitation as found in the proviso to the extension.

[25] It was further contended for the insurer that the restricted reading advocated by the insured in this case, to limit 'loss of money' to mean only physical money, was tantamount to

contending that the exclusion as found in exclusion cl. 1(d) was intended to be duplicated. **Exclusion cl. 1(d)**, was as noted earlier still intact and operative in this case as there was no optional extension to nullify the same. Exclusion cl. 1(d) stated that there would not be any indemnity for "... loss of money, negotiable instrument (including shares), bearer bonds or coupons, stamps, bank or currency notes **in the care or custody of the insured**; or" (emphasis added), clearly denoting it was to cover loss of physical money in the hands of the insured.

[26] Hence, it was submitted that the 'loss of money' used in the proviso or limitation to option 1-extension could not also mean physical money; it necessarily had to be something beyond that.

The intention of the policy (when construed as a whole) it was argued, was simple and 'clear enough and there was therefore no room for any *'contra proferentum'* rule or for any logical interpretation to be applied in this instance.

[27] The insured repeated the main grounds that had been previously canvassed before the High Court. It was argued that the learned trial judge's construction of the phrase 'loss of money' effectively defeated the very purpose or object of the insurance policy itself and more specifically the option 1-extension, for which cover of risk, additional premium had been paid by the insured. The reference 'loss of money' in the proviso or limitation to the extension, it was argued, could therefore only mean loss of physical money and did not extend to loss of a financial value occasioned to the insured, as construed by the High Court.

[28] Counsel for the insured submitted further that although the High Court was right to perhaps take into consideration the reasoning found in *Rouleston Clarke*'s case, the learned trial judge had overlooked that Crawford J had also cited in that judgment various instances where such proviso or limitation would not apply.

One of the examples set out in particular was where an employee deliberately and maliciously caused a client to pay excessive tax (the insured in that case was in the business of tax agents) and such limitation did not apply. It was argued that Razak's action in inducing the bank to pay 'excessive premiums', in our case, would fall squarely within such a stated exception and the learned trial judge had failed to direct her attention thereto.

[29] One other point of some significance put forward by counsel for the insured was that the very purpose of the option 1-extension was to provide cover for risks "... arising out of or contributed to by the dishonest, fraudulent, malicious or deliberate conduct of Insured, employees ...", and the normal and natural consequence or any such breach or lapse was in any event 'financial loss'. In the circumstances to deny that coverage (by construing 'loss of money' as all pervading including loss of financial value) would make no commercial sense and make such coverage clearly intended in this situation, totally worthless.

In so doing, the learned trial judge, it was argued, had excluded the very peril or risk intended to be covered and in its place misplaced her emphasis on to the consequences of such a risk, when she dismissed the insured's claim.

Judgment Of The Court

[30] In our judgment, the *ratio* of the decision of the Supreme Court of Tasmania in the case of *Rouleston Clarke Pty Ltd (In liquidation) v. FAI General Insurance Company Limited* [1999] TASSC 150 is that pronounced by the court in para. 25 of the judgment of the court. This reads as follows:

> I reject the Plaintiff's contention that 'loss' should be construed as meaning a physical loss which does not encompass a loss arising from Mr. Badger's conversion of the clients' negotiable instruments to his own use. The meaning of loss includes detriment or disadvantages from being deprived of the benefit of any of the specified items regardless of whether they have been physically destroyed or mislaid. The detriment suffered as a consequence of Mr. Badger's conduct is such a loss. I accordingly conclude that as a consequence of the proviso to the dishonestly extension, the claims are excluded from cover by that extension.

[31] With respect, in our judgment, the learned counsel for the respondent and the learned trial judge misunderstood the *ratio* of the decision of the court by unduly concentrating on the words 'loss of money' and whether these words should be accorded the limited meaning of physical loss of money or the wider meaning of financial loss. With respect, in our view, this focus on the meaning of the words 'loss of money' caused Her Ladyship to disregard the pronouncements in the same judgment of the court that the proviso only applies where the detriment or disadvantage suffered by the insured arises from being "deprived of the benefit of any

of the specified items regardless of whether they have been physically destroyed or missing". Our understanding of the *ratio* of the judgment of the Tasmanian Supreme Court is that a pre-requisite to the applicability of the proviso is that the loss (physical or otherwise) must concern one of the specified items listed in the proviso. Our view to this effect is reinforced by the pronouncements contained in para. 20 of the same judgment of the court to the following effect:

> **In construing the proviso, it is to be borne in mind that it relates to claims for damages for the loss of specified items**. Claims for damages are only made where a financially measurable loss has been suffered. Whilst the physical loss of some of the specified items, such as bank or currency notes, will cause a financial loss, that is not always the case with some of the other items such as negotiable instruments. When a negotiable instrument is physically lost, for example, destroyed or mislaid, it may readily be replaced without any financial loss. **It is when the negotiable instrument is converted to the use of another that financial loss is suffered**. This suggests that loss means more than physical loss. Support for this suggestion comes from a consideration of the conduct which must give rise to the loss referred to. That conduct is the 'dishonest, fraudulent, criminal or malicious conduct of employees. Whilst physical loss of the items referred to can arise from conduct of this description, the sort of loss which is more readily linked to this sort of conduct is a detriment or disadvantage arising from the appropriation of the specified item to the use of an employee. (emphasis added)

[32] The net effect of the highlighted portions of the judgment of the Supreme Court of Tasmania is that the proviso only operates to preclude the insured from being indemnified by the insurer in cases where at the point of loss/misappropriation of any of the specified items listed in the proviso by an employee of the insured, the items either belonged to the insured or were in the custody of the insured. Our rationale for this construction of the proviso is that in cases where an employee of the insured misappropriates or loses one of the specified items listed in the proviso, then, the loss is that of the insured and not the client of the insured. In a fact situation of this nature, the insured cannot demand to be indemnified by the insurer because the optional extension clause only exists to indemnify the insured where the client of the insured has been defrauded by the fraudulent conduct of the employee when performing his duties on behalf of the insured and not to cases where the insured has been defrauded by his own employee. In other words, the emphasis should be on the nature

of the claim of the client of the insured. This must necessarily be so, in our opinion, because the optional extension clause only operates in respect of claims where the insurers are not liable in the first place under exclusion cl. 1 (b). Hence, the pronouncement by the judge of first instance in the *Rouleston Clarke*'s case that:

> The question for my determination in relation to each claim is whether it is denied cover by Exclusion (b) as being a 'claim ... for ... dishonest, fraudulent ... criminal or malicious ... acts or omissions ... of the Insured's ... employees?

[33] Accordingly, in our judgment, the foremost consideration when answering the two questions ought to have been, who was the victim of the dishonest conduct of Razak and whether the claim of the client of the insured fell within cl. 1 (b) of the policy so as to invite the operation of the optional extension clause. In our respectful view, the answer to both questions should have been in the positive upon a consideration of the aforesaid two factors. First, the *modus operandi* of Razak as highlighted in para. 6 of this judgment was to misrepresent the client's obligations as regards monies due from the client to the insured. Following such misrepresentation, Razak misappropriated monies paid by the client of the insured but clearly not due to the insured. Secondly, to the extent the monies paid by the client bank (on the facts of this case) to the insured were not lawfully due to the insured, the monies could not be said to belong to the insured. In other words, the victim of the fraud perpetrated by Razak was not the insured but its client, the bank. Thirdly, it is evident that any claim for the recovery of the excess premiums by the client against the insured would have been based on the dishonest conduct of Razak and to that extent the claim would clearly fall within cl. 1(b) and consequently avoid liability on the part of the respondent insurers but for the optional extension clause. This has to be contrasted with the situation in *Rouleston Clarke*'s case where the claim of the victim was for the failure of the insured to account for the negotiable instruments and consequently outside the ambit of cl. 1 (b) (see para. 15 of the judgment of the Supreme Court of Tasmania).

[34] In our judgment, the construction placed by the High Court on the optional extension clause would effectively deprive the extension option of any relevance to the insured. We opine to this effect because the reasoning of the High Court effectively meant that all forms of financial loss would fall outside the ambit of the optional extension thereby depriving the appellant of the peril that

it had insured against. With respect, the flaw in this reasoning is that in all cases of dishonest conduct there is bound to be a financial loss. Accordingly, in our judgment, the only manner to reconcile the optional extension clause with exclusion cl. 1(b) of the insurance policy is to focus on the nature of the claim of the victim against the insured bearing in mind that exclusion cl. 1(b) makes it clear that, without the optional extension clause the insured would not be indemnified in respect of claims directly arising out of the fraudulent acts of employees, such as Razak.

[35] We are fortified in our conclusion that on the facts of this case, the appellant insured is entitled to be indemnified by the example provided by Crawford J in the decision of the Tasmanian Supreme Court. In para. 25 of His Lordship's judgment, His Lordship expressed the view that one instance where the claim of the insured would fall within the ambit of the optional extension clause would be where "an employee deliberately and maliciously causing a client to pay excessive tax (the appellant carried on the business of tax agent)". Similarly, in our case, the appellant insured was in the business of insurance broking. In other words, the appellant placed and arranged insurance for its clients. The dishonest Razak caused the client of the appellant to overpay the actual insurance premiums, which he then proceeded to fraudulently appropriate to his own benefit. Upon the said fraud being discovered, the victim bank client demanded and obtained the excess premiums from the appellant. In our judgment, the facts of our case fall within the four corners of the example furnished by Justice Crawford.

For the reasons contained in this judgment, we allow the appeal with costs and set aside the orders of the High Court. We order that there be judgment for the appellant in terms of prayers (a) and (b) of the statement of claim. The respondent is hereby ordered to pay the sum of RM40,000 as costs here and below to the appellant. The deposit is hereby refunded to the appellant.